DOCKET FILE COPY ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
FEB 13 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of		
Assessment and Collection Of Regulatory Fees for Fiscal Year 1995	)))	**MD Docket No. 95-3**

COMMENTS OF EDS CORPORATION

EDS Corporation ("EDS"), by its attorneys, hereby files its comments on the Notice of Proposed Rulemaking ("Notice"), FCC 95-14, issued January 12, 1995, in the above-captioned proceeding. As discussed below, EDS opposes the proposed restructuring of the Congressionally-prescribed formula by which annual regulatory fees are calculated for earth station antennas smaller than 9 meters that are not part of very small aperture terminal ("VSAT") systems.

DISCUSSION

EDS, through its subsidiary corporation E.D.S. Spectrum Corporation, is the licensee of numerous earth stations smaller than 9 meters. EDS licensed these earth stations either as part of a VSAT system or on an individual station-by-station basis. In 1994, EDS paid annual regulatory fees for these earth stations based on the formula prescribed by Congress in Section 9(g) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 159(g). Congress required that earth stations smaller than 9 meters be assessed regulatory fees on a per-antenna basis as follows: a $0.06 fee per antenna for (1) VSAT systems or

No. of Copies rec'd 0+9
List A B C D E

equivalent C-band antennas, (2) mobile satellite earth stations, and (3) other earth station antennas smaller than 9 meters ("small, non-VSAT antennas"), with a minimum payment of $6.00 per category. Congress required that regulatory fees for earth station antennas 9 meters or larger be assessed on a per-meter basis ($85.00 per meter for transmitting antennas and $55.00 per meter for receive-only antennas) rather than on a per-antenna basis.

In the Notice, the Commission proposes overall higher annual regulatory fees in 1995 for Common Carrier and Mass Media services and lower overall fees for Private Radio services. EDS does not challenge in these comments the higher amount of overall costs to be recovered by the Commission under its Section 9 fee program ($116.4 million in fees to be recovered in 1995 as compared with $60.4 million in 1994.)

To recover the higher amounts from Common Carrier services, the Commission proposes to increase the fee levels for each fee subcategory prescribed under Section 9(g) of the Act by a factor of 2.189. See Notice at Appendix G. The Commission's proposal would not be unreasonable if it applied the factor to each type of service consistently across the board. In fact, however, the Commission's proposal is unreasonable to the extent that the Commission, without adequate justification, singles out a particular subcategory (small, non-VSAT earth stations) and applies to it a different fee structure than Congress intended.

Under its 1995 proposal, the Commission no longer would treat small, non-VSAT antennas similar to VSAT antennas for fee purposes, as Congress had prescribed. Rather, the Commission would treat small, non-VSAT antennas like antennas 9 meters or larger. This proposed change will have an enormous financial impact on licensees of small, non-VSAT earth stations. For example, if a licensee operates 20 such antennas with an average size of 5 meters, in 1994 that licensee was subject to total annual regulatory fees of $6.00. **If the Commission retained the same per-antenna formula for calculating small, non-VSAT fees to recover the higher overall 1995 regulatory costs, that licensee's assessment would increase to a total of $13.00 in 1995. Under the Commission's proposed revised formula for 1995, however, that same licensee would be subject to regulatory fees over 3,000 times greater, $18,500.00 (20 x 5 meters x $185/m).**

The Commission's proposed change in fee formula is inconsistent with Congressional intent. Less than two years ago, Congress prescribed a regulatory fee formula that required small, non-VSAT antennas to be assessed fees at the same rate level and on the same per-antenna basis as VSATs and C-band equivalents. This fee formula prescribing parity among all small earth station antennas was the result of Congressional balancing of a number of factors. The Commission may not substitute its judgment for that of Congress without a reasoned basis.

Although Section 9(b)(3) of the Act, 47 U.S.C. § 159(b)(3), provides the Commission with permissive authority to

amend the Congressionally-prescribed schedule of regulatory fees, the Commission's authority to amend the fee schedule is not unbounded.[1/] Section 9(b)(3) requires that "[i]n making such amendments, the Commission shall add, delete, or reclassify services in the Schedule [of Regulatory Fees] to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law." In fact, however, since the enactment of the regulatory fee schedule in Section 9 of the Act, no change of the type described in Section 9(b)(3) has taken place that would affect small, non-VSAT earth station antennas.

Nor may the Commission rely on Section 9(b)(1)(A) of the Act, 47 U.S.C. § 159(b)(1)(A), to support its proposed changes to the fee structure for small, non-VSAT earth stations. That section authorizes the Commission to adjust fees "to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest." The Commission also failed to analyze the proposed change under this statutory rubric.

[1/] Administrative agencies may assess fees on their regulatees only in strict conformance with statutory criteria. New England Power Co. v. Federal Power Commission, 467 F.2d 425 (D.C. Cir. 1972), aff'd 415 U.S. 345 (1974).

The Commission's only explanation for the proposed restructuring is that the Congressionally-prescribed formula results "in the anomaly that antennas performing the same function were subjected to different fees." Notice at para. 49. The Commission, however, fails to recognize that its claimed rationale for restructuring also would apply to VSATs and VSAT-equivalents, because all earth stations, including VSATs and antennas 9 meters or larger, are capable of "performing the same function," that is, transmitting communications via satellite. The Commission may not modify the fee structure prescribed by Congress for one type of antenna but not for another without articulating a valid basis for the distinction.

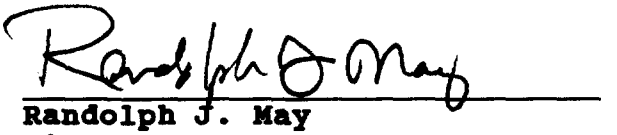
In fact, the important distinction among transmitting earth station antennas is one consistent with that drawn by Congress: earth stations 9 meters or larger generally are used for much different purposes than smaller antennas. Antennas 9 meters or larger generally are used by major common carriers to transmit and receive large amounts of switched traffic, for telemetry, tracking and control (TT&C), or for other highly sophisticated purposes. On the other hand, earth stations smaller than 9 meters, both VSAT and non-VSAT, often are used by private companies for intracorporate voice, data or video traffic. Indeed, below the 9 meter threshold drawn by Congress, even size is not necessarily a distinguishing characteristic between VSAT and non-VSAT earth stations. Many of the non-VSAT antennas that would be subject to the Commission's proposed

modified fee structure will be smaller in size than antennas licensed as part of a VSAT system.[2/]

CONCLUSION

Congress intended that small, non-VSAT antennas be treated similarly to VSATs and C-band equivalents with regard to regulatory fees, both in terms of fee level and fee structure. The Commission may adopt changes to the fee structure only to the extent that they reflect "changes in the nature of its services" or "benefits provided to the payor of the fee." The Commission has failed to comply with these statutory mandates. The Commission should retain the Congressionally-prescribed fee structure under which it charges non-VSAT antennas smaller than 9 meters on the same basis as it charges VSAT antennas.

Respectfully submitted,
E.D.S. Corporation



Randolph J. May
Timothy J. Cooney
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, NW
Washington, DC 20004-0100
(202) 383-0100

February 13, 1995

[2/] The Commission has defined VSATs as "a large number of technically identical facilities using antennas less than 5 meters in diameter in the 12/14 GHz bands." Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, Common Carrier Bureau Mimeo 3588, April 9, 1986. Today, the Commission frequently licenses antennas smaller than 5 meters on a stand-alone (non-VSAT) basis.

CERTIFICATE OF SERVICE

I, Teresa A. Pumphrey, hereby certify that copies of the foregoing Comments of EDS Corporation were served by hand or via first-class United States Mail, postage prepaid on this 13th day of February 1995 on the following:

Hon. Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Hon. James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Hon. Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Hon. Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Hon. Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Peter W. Herrick
Acting Associate Managing Director
Program Analysis
Federal Communications Commission
1919 M Street, N.W., Room 528
Washington, D.C. 20554

*International Transcription Service, Inc.
Suite 140
2100 M Street, N.W.
Washington, D.C. 20554

Teresa A. Pumphrey

* By Hand